Supreme Court, U.S.
FILED

981130 JAN 13 1999

OFFICE OF THE CLERK

No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

CITY OF DALLAS, TEXAS, DODD MILLER
*Cross-Respondents,*

VS.

DALLAS FIRE FIGHTERS ASSOCIATION, et al.,
*Cross-Petitioners.*

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

## CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

HAL K. GILLESPIE
STATE BAR NO. 07925500
*Counsel of Record*
GILLESPIE, ROZEN, TANNER & WATSKY, P.C.
2777 Stemmons Frwy., Suite 1625
Dallas, Texas 75207-4099
Ph.: (214) 634-0333
FAX: (214) 634-0407

*Attorney for Cross-Petitioners*

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011 314-231-4477

## QUESTIONS PRESENTED

I. WHETHER THE FIFTH CIRCUIT COURT OF APPEALS ERRED IN GRANTING THE CITY'S AND MILLER'S MOTION FOR SUMMARY JUDGMENT AS TO THE CROSS-PETITIONERS' CLAIMS GIVEN THE EXISTENCE OF A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER RACE AND/OR RACE BASED "GOALS" OF THE CITY'S AFFIRMATIVE ACTION PLAN ULTIMATELY CONTROLLED DEPUTY CHIEF PROMOTIONS IN VIOLATION OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED AND/OR ARTICLE 5221k OF THE TEXAS CIVIL STATUTES.

## PARTIES TO THIS PROCEEDING

The parties to this proceeding are as follows:

| | |
|---|---|
| City of Dallas | Defendant-Petitioner |
| Dodd Miller | Defendant-Petitioner |
| Dallas Fire Fighters Association | Plaintiff-Respondent |
| Kurtis Allen | Plaintiff-Respondent |
| Gary Baczkowski | Plaintiff-Respondent |
| James E. Byford | Plaintiff-Respondent |
| Donnie G. Campbell | Plaintiff-Respondent |
| Hal Collins | Plaintiff-Respondent |
| Kyle S. Cowden | Plaintiff-Respondent |
| Tommy L. Crawford | Plaintiff-Respondent |
| Robert Davis | Plaintiff-Respondent |
| Michael A. Davault, On Behalf of Michael D. Davault | Plaintiff-Respondent |
| Glenn D. Dickerson | Plaintiff-Respondent |
| Richard E. Gambrell | Plaintiff-Respondent |
| Wallace J. Graves | Plaintiff-Respondent |
| Ronald W. Hall | Plaintiff-Respondent |
| Kenneth L. Harris | Plaintiff-Respondent |
| Michael J. Hughes | Plaintiff-Respondent |
| Harold A. Jerpi | Plaintiff-Respondent |

**PARTIES TO THIS PROCEEDING** – *Continued*

| | |
|---|---|
| James R. Jones | Plaintiff-Respondent |
| Russell T. Jones | Plaintiff-Respondent |
| James A. Jordan | Plaintiff-Respondent |
| Curtis P. Julian | Plaintiff-Respondent |
| Paul W. Julian | Plaintiff-Respondent |
| John E. Keck, Sr. | Plaintiff-Respondent |
| Parke E. Mainz | Plaintiff-Respondent |
| Jack S. Martin | Plaintiff-Respondent |
| David E. Mask | Plaintiff-Respondent |
| Robert D. McCrimmen | Plaintiff-Respondent |
| Louis McKay, Jr. | Plaintiff-Respondent |
| John W. McKinney | Plaintiff-Respondent |
| Kenneth D. Moore | Plaintiff-Respondent |
| Allen Mullins | Plaintiff-Respondent |
| Randy M. Myers | Plaintiff-Respondent |
| John P. Nimmo | Plaintiff-Respondent |
| James C. Pearson | Plaintiff-Respondent |
| Brent K. Rogers | Plaintiff-Respondent |
| Timothy J. Seymore | Plaintiff-Respondent |
| Paul A. Skoog | Plaintiff-Respondent |
| John D. Shook | Plaintiff-Respondent |

**PARTIES TO THIS PROCEEDING – *Continued***

| | |
|---|---|
| Tony L. Speck | Plaintiff-Respondent |
| Arthur R. Sullivan | Plaintiff-Respondent |
| John D. Sutton | Plaintiff-Respondent |
| Tom Tanksley | Plaintiff-Respondent |
| Richard Wachsman | Plaintiff-Respondent |
| Michael J. Watson | Plaintiff-Respondent |
| Haskell Willeford | Plaintiff-Respondent |
| Steven B. Wise | Plaintiff-Respondent |
| Ken Bailey | Plaintiff-Respondent |
| Johnny E. Bates | Plaintiff-Respondent |
| Danny Beck | Plaintiff-Respondent |
| Samuel C. Brodner | Plaintiff-Respondent |
| Gerald D. Brown | Plaintiff-Respondent |
| Jesus A. Cantu, Jr. | Plaintiff-Respondent |
| John R. Colwick | Plaintiff-Respondent |
| Stephen D. Corder | Plaintiff-Respondent |
| Gregory J. Courson | Plaintiff-Respondent |
| Paul Edward Davis | Plaintiff-Respondent |
| Roy G. Ferguson | Plaintiff-Respondent |
| David D. Kinney | Plaintiff-Respondent |
| James B. Lamar | Plaintiff-Respondent |

**PARTIES TO THIS PROCEEDING** – *Continued*

| | |
|---|---|
| Michael L. McGehee | Plaintiff-Respondent |
| Joseph E. McKenna | Plaintiff-Respondent |
| Stephen Louis Mulvany | Plaintiff-Respondent |
| Jimmy L. Patton | Plaintiff-Respondent |
| Ray F. Reed | Plaintiff-Respondent |
| Ronnie W. Roe | Plaintiff-Respondent |
| Johnny L. Rudder | Plaintiff-Respondent |
| Sammy Don Sline | Plaintiff-Respondent |
| Charles Richard Saunders, Jr. | Plaintiff-Respondent |
| Thomas E. Taylor | Plaintiff-Respondent |
| Bryant E. Tillery | Plaintiff-Respondent |
| George Tomasovic | Plaintiff-Respondent |
| Glenn Truex | Plaintiff-Respondent |

## CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

***TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:***

Cross-Petitioners Dallas Fire Fighters Association, Hal Collins, Robert A. Davis, Thomas R. Tanksley, Richard Wachsman, and Haskell Willeford ("Cross-Petitioners") respectfully pray that this Honorable Court conditionally issue a Writ of Certiorari to review the Judgment and Opinion issued August 5, 1998 by the United States Court of Appeals for the Fifth Circuit ("the Fifth Circuit") in favor of Cross-Respondents City of Dallas, Texas, and Dodd Miller as to the deputy chief claims.

## CITATION OF OFFICIAL AND UNOFFICIAL REPORTS BELOW

The Fifth Circuit's opinion, cited as *Dallas Fire Fighters Ass'n, et al. v. City of Dallas, et* al., 150 F.3d 438 (5th Cir. 1998), affirmed in part and reversed in part the Final Judgment of the United States District Court for the Northern District of Texas, Dallas Division ("the District Court"), and rendered judgment in favor of the City and Miller with respect to the deputy chief claims only. The District Court's opinion is cited as *Dallas Fire Fighters Ass'n, et al. v. City of Dallas, et al.*, 885 F.Supp. 915 (N.D. Tex. 1995).

## STATEMENT OF JURISDICTION

Cross-Petitioners file this Conditional Cross-Petition for Writ of Certiorari appealing the Fifth Circuit's August 5, 1998 Opinion and Judgment. This Court has jurisdiction under 28 U.S.C. §§ 1254(1), 2106, and Rules of the Supreme Court of the United States, Rule 12.5 (the City's Petition for Writ of Certiorari was docketed December 14, 1998) to conditionally review, on a Writ of Certiorari, the Fifth Circuit's Opinion and Judgment.

## CONSTITUTIONAL PROVISIONS AND STATUTES

The following constitutional provisions and statutes are involved in this case: U.S. Const. Amend. XIV, § 1; 42 U.S.C. §§ 1983 and 1988 (1994); 42 U.S.C. §§ 2000e-5, et seq.; Tex. Const. Art. 1 § 3; Tex. Rev. Civ. Stat. Ann. Art. 5221k, § 5.01 (West 1989)(now codified as Tex. Lab. Code Ann. § 21.051 (West 1996)).

## STATEMENT OF THE CASE

### 1. Statement of Facts

In 1990, Miller, on behalf of the City, selected Robert Bailey, black, as deputy chief. Based upon deputy chief test scores, all candidates for promotion to deputy chief were ranked from highest to lowest on a list of eligibles. Cross-Petitioners (caucasians), were ranked higher than Bailey on the list of eligibles. Normally, the person ranked highest on the list of eligibles is selected for promotion. Miller avered in his affidavit that he selected Bailey because Bailey was capable of performing the deputy chief job responsibilities, was recommended by his executive staff, and was promoted pursuant to the City's Affirmative Action Plan ("AAP"). (R. Vol. V., p. 170). The AAP contained various goals for the promotion of executives (including deputy chiefs), with the goal of twenty-five (25%) percent for blacks. (R. Vol. V., p. 103). Miller never avered that his decision to select Bailey was not ultimately controlled by the "goals" of the AAP. Miller never avered that he compared the qualifications of Bailey with the qualifications of any of the Cross-Petitioners or anybody else. Furthermore, the City's responses to Cross-Petitioners' Interrogatory No. 4 setting forth the reasons for Bailey's promotion makes no mention of a recommendation by Miller's staff as does his affidavit and no explanation was provided by the City or Miller for this discrepancy. (R. Vol. VI., Exhibit B). As a result of Miller's promotion of Bailey to the

deputy chief position in an effort to meet racial goals, Cross-Petitioners were denied promotion, thereby trammeling their rights.

**2. Basis of Federal Jurisdiction in Court of First Instance**

Jurisdiction in the court of first instance, the United States District Court for the Northern District of Texas, Dallas Division, is based on the following: 28 U.S.C. § 1441; 28 U.S.C. § 1331; 28 U.S.C. § 1343(a); and 28 U.S.C. § 1367(a).

## ARGUMENT AND AUTHORITIES

### I. WHETHER THE FIFTH CIRCUIT COURT OF APPEALS ERRED IN GRANTING THE CITY'S AND MILLER'S MOTION FOR SUMMARY JUDGMENT AS TO THE CROSS-PETITIONERS' CLAIMS GIVEN THE EXISTENCE OF A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER RACE AND/OR RACE BASED "GOALS" OF THE CITY'S AFFIRMATIVE ACTION PLAN ULTIMATELY CONTROLLED DEPUTY CHIEF PROMOTIONS IN VIOLATION OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED AND/OR ARTICLE 5221k OF THE TEXAS CIVIL STATUTES.

Cross-Petitioners seek the issuance of a Writ of Certiorari only on the condition of the Court granting the City's and Miller's Petition for Writ of Certiorari.

In the event that the Court grants the City's and Miller's Petition for Writ of Certiorari, the Court should also issue a Writ of Certiorari based upon the Fifth Circuit's rendering of judgment in favor of the City and Miller with respect to the Cross-Petitioners' claims. Specifically, a genuine issue of material fact exists as to whether Miller, on behalf of the City, used Robert

Bailey's race, in an effort to meet AAP goals, as a trump card in deciding to select him for promotion to the deputy chief position in violation of Title VII. *Johnson v. Transportation Agency of Santa Clara,* 480 U.S. 616, 107 S.Ct. 1442 (1987). This issue caused a split in the Fifth Circuit panel that decided the case below, generating a dissenting opinion calling for the City's and Miller's summary judgment motion to be denied as to these claims. *Dallas Fire Fighters Ass'n*, 150 F.3d at 443.

Because Miller and the City had the burden of proof on summary judgment to eliminate every possibility or inference that race was not a trump card in the Bailey promotion, the failure ofMiller to aver in his affidavit that race was not the determining factor, that the decision was not ultimately controlled by the racial "goals" of the AAP, and/or that he compared Bailey's qualifications with the Cross-Petitioners' qualifications precludes summary judgment in favor of the City and Miller as a matter of law. *Anderson v. Liberty Lobby,* 477 U.S. 242, 106 S.Ct. 2505 (1986); *Celetex v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548 (1986). When this is coupled with the fact that there was a non-existent relationship between the AAP racial goals for the deputy chief position and the relevant feeder groups, the Fifth Circuit plainly erred in granting the City's and Miller's motion for summary judgment as to the Cross-Petitioners' claims.

At bottom, the Fifth Circuit's ruling with respect to Cross-Petitioners' deputy chief claims so far departed from the accepted and usual course of judicial proceedings, particularly with respect to application of Title VII and summary judgment jurisprudence set forth by this Court, so as to call for an exercise of this Honorable Court's supervisory power. Furthermore, the issues raised herein are closely related to the issues raised in the City's and Miller's Petition for Writ of Certiorari and, if that Writ is granted, then the issues concerning the Cross-Petitioners' deputy chief claims should also be reviewed by this Court for

complete and proper disposition of all outstanding issues in the case.

## CONCLUSION

For all of the foregoing reasons, Cross-Petitioners respectfully request that this Honorable Court conditionally grant their Cross-Petition for Writ of Certiorari, reverse the opinion of the Fifth Circuit rendering judgment in favor of the City and Miller as to the Cross-Petitioners' deputy chief claims, remand that sole issue for trial with the District Court, and for such other and further relief, at law and in equity, to which Cross-Petitioners show themselves justly entitled.

Respectfully submitted,

HAL K. GILLESPIE
STATE BAR NO. 07925500
*Counsel of Record*
GILLESPIE, ROZEN, TANNER & WATSKY, P.C.
2777 Stemmons Frwy., Suite 1625
Dallas, Texas 75207-4099
Ph.: (214) 634-0333
FAX: (214) 634-0407

*Attorney for Cross-Petitioners*

Supreme Court, U.S.
FILED
FEB 16 1999
CLERK

No. 98-1130

In The

# Supreme Court of the United States

October Term, 1998

DALLAS FIRE FIGHTERS ASSOCIATION, *et al.*,

*Cross-Petitioners,*

vs.

CITY OF DALLAS, TEXAS, DODD MILLER,

*Cross-Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## CROSS-RESPONDENTS' BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

ANGELA K. WASHINGTON
Interim City Attorney
Texas State Bar No. 20897155

JANICE S. MOSS
Assistant City Attorney
Texas State Bar No. 14586050
*Counsel of Record*

LIZBETH ISLAS
Assistant City Attorney
Texas State Bar No. 00787750
7CN Dallas City Hall
1500 Marilla Street
Dallas, Texas 75201
(214) 670-3510 - Telephone
(214) 670-3515 - Telecopier

*Attorneys for Cross-Respondents*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Fifth Circuit applied the correct legal standard in holding that Cross-Petitioners presented no genuine issue of material fact regarding whether the Deputy Chief appointment violated Title VII of the Civil Rights Act of 1964 and Article 5221k of the Texas Civil Statutes.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... iii

STATEMENT OF THE CASE ..... 1

1. Statement of Facts ..... 1

2. Basis of Federal Jurisdiction in Court of First Instance ..... 6

ARGUMENTS SUPPORTING DENIAL OF THE WRIT ..... 6

I. Whether the United States Court of Appeals for the Fifth Circuit applied the correct legal standard in holding that Cross-Petitioners presented no genuine issue of material fact regarding whether the Deputy Chief appointment violated Title VII of the Civil Rights Act of 1964 and Article 5221k of the Texas Civil Statutes ..... 6

A. Summary Judgment: The Appropriate Legal Standard ..... 6

B. There are no material facts in dispute that the Deputy Chief appointment violated Title VII .. 8

1. A manifest imbalance existed ..... 8

2. The appointment of Robert Bailey to Deputy Chief did not unnecessarily trammel the rights of the nonminorities or create an absolute bar to their advancement ... 9

C. There are no material facts in dispute that the Deputy Chief appointment violated Article 5221k Claim of the Texas Civil Statutes ..... 13

CONCLUSION ..... 14

# TABLE OF AUTHORITIES

Page

CASES

*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) ..... 7

*Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) ..7, 8, 10, 11

*Chevron Corp. v. Redmon*, 745 S.W.2d 314 (Tex. 1987) ..... 14

*Dallas Fire Fighters Ass'n, et al. v. City of Dallas, et al.*, 150 F.3d 438 (5th Cir. 1998) .....8, 9

*Dallas Fire Fighters Ass'n, et al. v. City of Dallas, et al.*, 885 F.Supp. 915 (N.D. Tex. 1995) ..... *passim*

*Fontenot v. Upjohn Co.*, 780 F.2d 1190 (5th Cir. 1986) ..... 7

*Johnson v. Transportation Agency*, 480 U.S. 616 (1987) .....8, 9, 10, 13

*Little v. Republic Refining Co., Ltd.*, 924 F.2d 93 (5th Cir. 1991) ..... 11

*Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1987) ..... 7

*Topalian v. Ehrman*, 954 F.2d 1125, *reh'g denied*, 961 F.2d 215 (5th Cir.), *cert. denied*, 506 U.S. 825 (1992) ..... 7

*Washington v. Armstrong World Industries, Inc.*, 839 F.2d 1121 (5th Cir. 1988) ..... 8

STATUTES

42 U.S.C. §§ 2000e-5, et seq. (Title VII of the Civil Rights Act of 1964) ..... *passim*

Fed.R.Civ.P. 56 .....6, 7

Tex. Rev. Civ. Stat. Ann. art. 5221k (West 1989) .. 6, 13, 14

## CROSS-RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

Cross-Respondents City of Dallas, Texas, and Dodd Miller ("Cross-Respondents," "the City," or "Miller") file this Brief in Opposition to Cross-Petitioners' Conditional Cross-Petition for Writ of Certiorari. In support thereof, Cross-Respondents respectfully show the Court as follows:

## STATEMENT OF THE CASE

### 1. Statement of Facts

Cross-Petitioners' statement of the facts is replete with incorrect facts. This Court should not be misled because Cross-Petitioners conspicuously have failed to support their assertions in fact with references to the record, and notably, in the courts below, Cross-Petitioners' references to the record led to no evidence showing an exam or an eligibility list ranking candidates for the position of Deputy Chief.

Specifically, Cross-Petitioners assert that "[b]ased upon deputy chief test scores, all candidates for promotion to deputy chief were ranked from highest to lowest on a list of eligibles," and that Miller selected Bailey for the Deputy Chief position even though "Cross-Petitioners (caucasians), were ranked higher than Bailey on the list of eligibles." Conditional Cross-Petition, p. 2. Cross-Petitioners asserted claims of a Deputy Chief exam and an eligibility list ranking Deputy Chief candidates at the

district court level in their motion for summary judgment. Rec., Vol. 2, p. 230. Cross-Petitioners also claim that the white males were more qualified than Bailey, the black male who was appointed. Cross-Petitioners submitted **no credible evidence in support of either claim,** because there is no evidence to support said claims.

In fact, all references by Cross-Petitioners in the record where they claim that there was an exam to become Deputy Chief and a resulting eligibility list either have **no** supporting documentation to show an exam or a promotional eligibility list for the rank of Deputy Chief, or the exhibits to which Cross-Petitioners refer conclusively prove that no exam or eligibility list existed. *See*, e.g., Record, Vol. 2, pp. 110; Vol. 6, Ex. D (refers only to exams and lists for lower ranks); Vol. 10, p. 243; Vol. 11, pp. 131-144. The references to the record to which Cross-Petitioners direct the attention of the lower courts are completely devoid of any showing of an exam or an eligibility list for the rank of Deputy Chief. The only statement in the record to support Cross-Petitioners' claims that they were more qualified than Bailey is a conclusory self-serving statement in their summary judgment brief that they were more qualified than Bailey, but notably, there is no evidence in the record to support said claim. Rec., Vol. 2, p. 221.

Cross-Respondents provide the following correct statement of the facts: Cross-Petitioners are members of the Dallas Fire Department who challenge the manner in which a few promotions have been made. The Dallas Fire Department does not make lateral hires, but instead fills all positions above the entry level by promotion. *Dallas*

*Fire Fighters Ass'n, et al. v. City of Dallas, et al.*, 885 F. Supp. 915, 918 (N.D. Tex. 1995). Promotions through the rank of Battalion Chief are accomplished in part through an exam and a promotional eligibility list. *Dallas Fire Fighters Ass'n*, 885 F. Supp. at 919. Promotions for the two ranks under the Fire Chief, Deputy Chief and Assistant Chief, are accomplished by appointments of the Fire Chief pursuant to the authority given him by the Dallas City Charter. App. 1, Dallas City Charter, Ch. XIII, §§ 1, 4. It is undisputed that beginning with the entry level, firefighter ranks are: Fire and Rescue Officer, Second Driver, Driver Engineer, Lieutenant, Captain, Battalion Chief, Deputy Chief, Assistant Chief and the Fire Chief. *Dallas Fire Fighters Ass'n*, 885 F. Supp. at 918-919.

> Among the various requirements for promotion **for the ranks up to and including battalion chief** is a promotional exam. Firefighters eligible for promotion are placed on a promotion list in descending order according to their scores on the exam. Unless a specific reason exists to pass over a particular candidate due to unsatisfactory job performance, disciplinary reasons, non-paramedic status or other reasons, members are promoted as vacancies occur by going down the eligibility list according to an individual's score on the exam.

*Dallas Fire Fighters Ass'n*, 885 F. Supp. at 919 (emphasis added). The Fire Chief is appointed by the City Manager, and the Dallas City Charter gives the Fire Chief authority to appoint persons to the two ranks below him (Assistant Chiefs and Deputy Chiefs). App. 1; Rec. Vol. 11, p. 006. The rank of Deputy Chief is one of the two ranks below the Fire Chief. *See Dallas Fire Fighters Ass'n*, 885 F. Supp.

at 919. The Deputy Chief promotion at issue in this case was made as an appointment by Chief Dodd Miller. *Dallas Fire Fighters Ass'n*, 885 F. Supp. at 925, n.17.

Immediately prior to the adoption of the affirmative action plan, the actual representation of minorities and females in the executive ranks (which include Deputy Chief) were as follows: 0% female, 0% Hispanic, and 5.3% Black. App. O, p. 141. As of March 31, 1993, three years **after** the alleged discriminatory appointment (of a minority to Deputy Chief), the executive ranks were still 70.5% white. App. P, p. 154.

In 1990, Chief Miller appointed Robert Bailey, a black male, to the position of Deputy Chief. *Dallas Fire Fighters Ass'n*, 885 F. Supp. at 925, n.17. Since the promotion was an appointment to a rank above the rank of Battalion Chief and to one of the two ranks below that of Fire Chief, **there was no examination for this rank and no eligibility list.** *See Dallas Fire Fighters Ass'n*, 885 F. Supp. at 925, n.17; *see also* App. 1. Accordingly, there is **nothing in the record** to show that any alleged potential candidates for Deputy Chief took an examination or were ranked on an eligibility list. In fact, the Dallas City Charter, Chapter XII, §§ 1, 4, provides that the Chief of the Fire Department has the authority to name his assistants in the two ranks below him, of which Deputy Chief is one of the ranks:

> SEC. 1. CREATION OF FIRE DEPARTMENT; PERSONNEL
>
> There is hereby created a fire department of the City of Dallas, at the head of which shall be the chief of the fire department. The fire department shall be composed of the chief of the fire

> department, whose office is hereby created and established, and other unclassified positions of assistants, limited to the two grades or ranks immediately below the grade or rank of chief, and classified employees as the council may provide by ordinance upon the recommendation of the city manager. **The chief of the fire department shall designate the order of succession of the assistant chiefs**, who shall perform the duties of the chief in the event of his disability, absence from the city or inability to perform his duties from any other cause.
>
> SEC. 4. APPOINTMENT OF MEMBERS.
>
> The members of the fire force, **other than the chief of the fire department and his assistants provided for by council ordinance**, shall be certified from the list of eligibles prepared by a civil service commission, in accordance with such rules and regulations as may be prescribed by the civil service commission; provided, however, that in case of civil disturbance, the city manager or the chief of the fire department may appoint additional firemen and officers for temporary service, who need not be in the classified service.

App. 1, emphasis added.

Bailey's appointment was made pursuant to the absolute and complete discretion afforded him by the Dallas City Charter. Chief Miller appointed Bailey based upon his belief that Bailey was qualified and capable of performing the job responsibilities of the position of Deputy Chief, and he was recommended for the position by Chief Miller's executive staff. *Dallas Fire Fighters Ass'n*, 885 F. Supp. at 925, n.17; Rec. Vol. 6, Ex. B, p. 5. The evidence

considered by the district court shows that race was simply one factor among many. *Dallas Fire Fighters Ass'n*, 885 F. Supp. at 925, n.17.

### 2. Basis of Federal Jurisdiction in Court of First Instance

Cross-Petitioners' statement regarding the basis of federal jurisdiction in the court of first instance is correct.

---

## ARGUMENTS SUPPORTING DENIAL OF THE WRIT

### I. The United States Court of Appeals for the Fifth Circuit applied the correct legal standard in holding that Cross-Petitioners presented no genuine issue of material fact regarding whether the Deputy Chief appointment violated Title VII of the Civil Rights Act of 1964 and Article 5221k of the Texas Civil Statutes.

#### A. Summary Judgment: The Appropriate Legal Standard

Summary judgment is appropriate in any kind of action

> . . . if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed.R.Civ.P. 56(c). A motion for summary judgment is proper when pleadings and the record taken as a whole demonstrate that there is no genuine issue of material fact

and that the movant is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In appropriate circumstances, awarding summary judgment is not disfavored in federal court: "[s]ummary judgment reinforces the purpose of the Rules, to achieve the just, speedy, and inexpensive determination of actions, and, when appropriate, affords a merciful end to litigation that would otherwise be lengthy and expensive." *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1197 (5th Cir. 1986).

A party moving for summary judgment need not support his motion with affidavits or other evidence negating the non-movant's claims. Fed.R.Civ.P. 56. To withstand a motion for summary judgment, the non-movant must present evidence sufficient to establish the existence of each element of his claim as to which he will have the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); and *Topalian v. Ehrman*, 954 F.2d 1125, *reh'g denied*, 961 F.2d 215 (5th Cir.), *cert. denied*, 506 U.S. 825 (1992). The threshold inquiry, therefore, is whether there are "any factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 251. The substantive law identifies what facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248.

Once the moving party establishes it is entitled to summary judgment, the burden shifts, and the non-moving party must "come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Rule 56(e)) (emphasis in original). In other

words, summary judgment is mandatory when a party fails to establish the existence of an essential element of his case on which that party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322-324; *Washington v. Armstrong World Industries, Inc.*, 839 F.2d 1121, 1122 (5th Cir. 1988). With the above summary judgment standards in mind, the Court of Appeals analyzed Cross-Respondents' motion and evidence and Cross-Petitioners' evidence, and concluded that Cross-Petitioners' evidence was insufficient to establish a material factual dispute and ordered judgment in favor of Cross-Respondents. Cross-Petitioners presented no new argument in their appeal below, nor do they here.

### B. There are no material facts in dispute that the Deputy Chief appointment violated Title VII.

#### 1. A manifest imbalance existed.

To determine the validity of the appointment under Title VII, the Court must decide whether consideration of the sex or race of the applicant was justified by the existence of a manifest imbalance that reflected the underrepresentation of women or minorities in traditionally segregated job categories and whether consideration of the sex or race of the applicant unnecessarily trammeled on the rights of male nonminorities or created an absolute bar to their advancement. *Johnson v. Transportation Agency*, 480 U.S. 616, 637-638 (1987). The Cross-Petitioners do not and have not disputed that a manifest imbalance existed within the rank of Deputy Chief. *See* Conditional Cross-Petition, pp. 2-5; *see also Dallas Fire Fighters Ass'n, et al. v. City of Dallas, et al.*, 150 F.3d 438,

442 (5th Cir. 1998). Therefore, no genuine issue of material fact existed regarding the first prong of the *Johnson* test, that is, the existence of manifest imbalance.

### 2. The appointment of Robert Bailey to Deputy Chief did not unnecessarily trammel the rights of the nonminorities or create an absolute bar to their advancement.

Chief Miller's appointment of Robert Bailey to Deputy Chief did not unnecessarily trammel the rights of the nonminorities or create an absolute bar to their advancement. Since the Deputy Chief position is an executive position and one of the two ranks in the Fire Department below the Fire Chief, discretion is entrusted to the Chief of the Fire Department to place in executive positions those persons he believed most suitable for the particular appointment. App. 1, Dallas City Charter, Ch. XIII, §§ 1, 4. Chief Miller enjoyed this discretion with the Deputy Chief appointment. Chief Miller provided an affidavit in which he stated that he believed Bailey was capable of performing the job responsibilities of the position of Deputy Chief and Bailey was recommended by his executive staff. *Dallas Fire Fighters Ass'n*, 150 F.3d at 442; *see also* Rec., Vol. 11, p. 203-204. In addition, Chief Miller testified that the appointment was within his discretionary authority and made pursuant to the AAP. "Evidence shows that, in this case, race was simply one factor among many." *Dallas Fire Fighters Ass'n*, 885 F. Supp. at 925, n.17. Clearly, race was only one factor of many that Chief Miller considered in appointing Bailey, and as the Fifth Circuit correctly noted, **Cross-Petitioners "have failed to produce any acceptable material evidence to**

the contrary." *Id.* The approach of considering race or sex as one factor pursuant to an affirmative action plan is fully consistent with Title VII. *See Johnson*, 480 U.S. at 640-642. Cross-Petitioners misstate and misunderstand what is the correct standard for summary judgment. Specifically, Cross-Petitioners state that

> Because Miller and the City had the burden of proof on summary judgment to eliminate every possibility or inference that race was not a trump card in the Bailey promotion, the failure of Miller to aver in his affidavit that race was not the determining factor, that the decision was not ultimately controlled by the racial "goals" of the AAP, and/or that he compared Bailey's qualifications with the Cross-Petitioners' qualifications precludes summary judgment in favor of the City and Miller as a matter of law.

Conditional Cross-Petition, p. 4. This Court has stated that the burden required for a moving party "may be discharged by 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325. The non-movant must present evidence sufficient to establish the existence of each element of his claim as to which he will have the burden of proof at trial. *Celotex*, 477 U.S. at 322. As stated in the Statement of Facts, Cross-Respondents have pointed out to the Court that there is an absence of evidence to support the nonmoving party's case. There is no evidence of an exam or a promotional eligibility list in order to be appointed to the position of Deputy Chief. Thus, there is no evidence that Bailey was a "skip promotion" over other candidates who allegedly scored higher on an exam, because there was no exam, no list, no ranking of the candidates. There simply is no

credible evidence in the record to show that others were more qualified than Bailey.

A movant is only required to demonstrate that the non-movant cannot prove an essential element of his claim. *Celotex*, 477 U.S. at 322-324. In order to prove discrimination with respect to the appointment of Robert Bailey to the position of Deputy Chief, Cross-Petitioners must show more than mere conjecture and conclusory allegations. *See Little v. Republic Refining Co., Ltd.*, 924 F.2d 93, 96 (5th Cir. 1991). This they have failed to do. The mere assertions, based on personal beliefs, that other candidates were more qualified than Bailey, and their personal beliefs that there might have been discrimination, are conjecture and constitute conclusory allegations.

Nothing in the record shows that an exam was given in order to qualify for the position of Deputy Chief or that there was a ranking of the candidates on a promotional eligibility list in order of their qualifications. In fact, the evidence considered by the district court demonstrates that an exam and eligibility list did not exist for the two ranks above Battalion Chief and for the two ranks to which Chief Miller could make appointments. *Dallas Fire Fighters Ass'n*, 885 F. Supp. at 919. In addition, Cross-Petitioners have not disputed that Bailey was qualified. Cross-Petitioners essentially defeated their own claims regarding the appointment of Robert Bailey to Deputy Chief by (1) offering no evidence to defeat the City's evidence that the appointment was properly effected pursuant to the authority vested in the Fire Chief by the Dallas City Charter to appoint his assistants in the two ranks below him and the City's evidence that race was not the only factor in making the appointment, and by (2)

offering no credible evidence (no evidence at all other than conclusory allegations) to support their claims that the white males were better qualified. Since Cross-Petitioners fail to adduce any evidence that they would have received the appointment but for their race, or that they were demonstrably more qualified than Robert Bailey, the United States Court of Appeals was correct in granting judgment in favor of the City of Dallas and Dodd Miller on Cross-Petitioners' challenge to the appointment of Bailey.

In addition, Cross-Petitioners further argue that Bailey's appointment to Deputy Chief unnecessarily trammelled the rights of nonminorities because the affirmative action goals are out of proportion to the percentage of available candidates. Conditional Cross-Petition, p. 4. Cross-Petitioners' argument is only speculative, because they have failed, however, to show any evidence that the relevant labor pools were not considered in this appointment of Bailey. In fact, in footnote 12 of Plaintiff's Motion for Summary Judgment filed in March, 1994, Cross-Petitioners admit that "[i]t is not disputed that in this case the City identified the proper qualified relevant labor pools." Rec., Vol. 2, p. 244. While the goals in the affirmative action plan are set across the board, the attainment of these goals is limited to the available feeder pool from which the promotional candidates are taken.

Bailey competed with all the other qualified applicants for the Deputy Chief appointment, the selection of which is discretionary with Chief Miller, and race was only one factor of many Miller considered in appointing Bailey. *Dallas Fire Fighters Ass'n*, 885 F. Supp. at 925, n.17. In addition, Cross-Petitioners had no absolute entitlement

to the position of Deputy Chief, and thus the denial of the appointment "unsettled no legitimate firmly rooted expectation" on their part. *See Johnson*, 480 U.S. at 638. Further, Cross-Petitioners retained their employment with the Fire Department, at the same salary and with the same seniority, and remained eligible for other appointments. *See Johnson*, 480 U.S. at 638. In short, Cross-Petitioners failed to produce any evidence to create a genuine issue of material fact regarding the second prong of the *Johnson* test, that is, that the Deputy Chief appointment unnecessarily trammelled the rights of nonminorities or created an absolute bar to their advancement. The Fifth Circuit correctly granted summary judgment in favor of the City and Miller.

The key distinction between the challenge to this appointment of Robert Bailey to Deputy Chief and the other challenged promotions to lower ranks is that Cross-Petitioners misrepresent that there was a test and a promotional eligibility list for the Deputy Chief hopefuls. In fact, Cross-Petitioners can point to nothing in the record to show a list or a test for the appointment because there was no list, no test. In fact, the record distinctly shows that Miller's appointment of Bailey was appropriate and lawful, pursuant to his authority under the Dallas City Charter, Ch. XIII, §§ 1, 4. App. 1.

### C. There are no material facts in dispute that the Deputy Chief appointment violated Article 5221k Claim of the Texas Civil Statutes.

Article 5221k of the Texas Civil Statutes is basically identical to and has been interpreted in conformance with

Title VII. *Chevron Corp. v. Redmon*, 745 S.W.2d 314, 316-17 (Tex. 1987). Accordingly, for the reasons discussed above with respect to Title VII, Cross-Petitioners failed to produce any evidence to create a genuine issue of material fact regarding whether the Deputy Chief appointment violated article 5221k.

## CONCLUSION

None of the issues Cross-Petitioners presented in their Conditional Cross-Petition for Writ of Certiorari is of such precedential value that warrants review by this Court. Additionally, there is no conflict among the circuits or among the circuits and state courts of last resort regarding any of the issues presented. Further, this case does not present an issue of federal law that needs to be settled by this Court. The Fifth Circuit meticulously reviewed the facts and applied correct legal standards in reaching its conclusions. For the reasons stated herein,

this Court should deny Cross-Petitioners' Conditional Cross-Petition for Writ of Certiorari.

Respectfully submitted,

City Attorney of the City of Dallas

ANGELA K. WASHINGTON
Interim City Attorney
Texas State Bar No. 20897155

JANICE S. MOSS
Assistant City Attorney
Texas State Bar No. 14586050
*Counsel of Record*

LIZBETH ISLAS
Assistant City Attorney
Texas State Bar No. 00787750
7CN Dallas City Hall
1500 Marilla Street
Dallas, Texas 75201
(214) 670-3510 – Telephone
(214) 670-3515 – Telecopier

*Attorneys for Cross-Respondents*

# INDEX TO APPENDIX

Page

Appendix 1 Dallas City Charter, Chapter XIII, §§ 1, 4 ..... App. 1

# APPENDIX 1

## CHAPTER XIII. FIRE DEPARTMENT

(Renumbered by Amend. of 6-12-73, Prop. No. 43)

### SEC. 1. CREATION OF FIRE DEPARTMENT; PERSONNEL.

There is hereby created a fire department of the City of Dallas, at the head of which shall be the chief of the fire department. The fire department shall be composed of the chief of the fire department, whose office is hereby created and established, and other unclassified positions of assistance, limited to the two grades or ranks immediately below the grade or rank of chief, and classified employees as the council may provide by ordinance upon the recommendation of the city manager. The chief of the fire department shall designate the order of succession of the assistant chiefs, who shall perform the duties of the chief in the event of his disability, absence from the city or inability to perform his duties from any other cause. (Amend. of 6-12-73, Prop. No. 27).

* * *

### SEC. 4. APPOINTMENT OF MEMBERS.

The members of the fire force, other than the chief of the fire department and his assistants provided for by council ordinance, shall be certified from the list of eligibles prepared by a civil service commission, in accordance with such rules and regulations as may be prescribed by the civil service commission; provided, however, that in case of civil disturbance, the city manager or the chief of the fire department may appoint additional firemen and officers for temporary service,

who need not be in the classified service. (Amend. of 6-12-73, Prop. No. 27)